

Matter of Maloney (Successful Strategies Intl., Inc.)
2010 NY Slip Op 30355(U)
February 5, 2010
Supreme Court, Suffolk County
Docket Number: 5834-08
Judge: Elizabeth H. Emerson
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SUPREME COURT - STATE OF NEW YORK
COMMERCIAL DIVISION
TRIAL TERM, PART 44 SUFFOLK COUNTY

PRESENT: Honorable Elizabeth H. Emerson

_____x
APPLICATION OF STEPHEN J. MALONEY,

Petitioner,

**For the Judicial Dissolution of SUCCESSFUL
STRATEGIES INTERNATIONAL, INC.
Pursuant to BCL §1104-a, THOMAS J.
MATTUS and RITA M. MATTUS,**

Respondents.

_____x

HASS & GOTTLIEB
Attorneys for Petitioner
670 White Plains Road, Suite 121
Scarsdale, New York 10583

LAW OFFICE OF STEVEN A. MORELLI
Attorney for Respondents
One Old Country Road
Carle Place, New York 11514

DECISION AFTER TRIAL

In early 2008, petitioner Stephen J. Maloney submitted a petition for judicial dissolution of Successful Strategies International, Inc. (hereinafter referred to as "SSI"), pursuant to BCL § 1104-a upon the grounds that the directors or those in control of SSI have been guilty of illegal, fraudulent, or oppressive actions towards petitioner, along with certain other requested relief. In response, respondents Thomas and Rita Mattus interposed a motion to dismiss the petition, arguing that petitioner lacked standing inasmuch as petitioner was not an equity owner of SSI. In reviewing the various requests for relief, the court determined that there were serious issues of fact regarding petitioner's ownership interest in SSI. In particular, petitioner claims that he holds 99 shares of stock or 49% of the issued and outstanding stock of SSI. In support of his claim, plaintiff has produced a stock certificate purporting to reflect such interest. In response, respondents allege that all issued and outstanding stock of SSI is owned by respondents and their two adult children. Respondents allege that petitioner was never an owner of SSI and has always

been an employee thereof. Accordingly, they claim that petitioner lacks the standing necessary to bring the petition for dissolution. The court set a schedule for discovery on this limited issue. After completion of discovery, the court conducted a hearing at the request of the parties to address the question of ownership. At the conclusion of the hearing, the court invited the parties to submit post-hearing memoranda of law, which they did by September 15, 2009. Set forth below is the court's decision on the limited issue of petitioner's alleged ownership of SSI and, by extension, a determination of respondents' motion to dismiss.

FACTS

The record reflects that SSI is a corporation formed in June of 2004. The purpose of SSI was to deliver project management and leadership training programs. Each of Mr. Maloney and Mr. Mattus had been involved in this field prior to the formation of SSI, and the record includes an extensive discussion of their respective experience in this field prior to SSI's formation. The record reflects that, at the time of the hearing, SSI had authorized capital of 200 shares of common stock and original stock certificates numbered 1 through 5 had been purportedly issued. Certificate number 1, which represents 100 shares, was issued in the name of Thomas Mattus. Certificate number 1 bears a date of June 14, 2004. Certificate 2, which represents 50 shares, was issued in the name of respondent Rita Mattus and bears a date of June 15, 2004. Certificates number 3 and number 4 each purport to evidence 25 shares issued to the respondent's adult children. They both bear a date of June 15, 2004. Certificate number 5, however, purports to represent 99 shares issued in the name of Stephen Maloney. It also bears a date of June 15, 2004. The record reflects that certificates 1-5 were, in fact, issued at a later date. Also, as noted at trial, certificates 1-5 purport to represent 299 shares. Such number exceeds the authorized capital of SSI by 99 shares. Respondents do not dispute the fact that certificate number 5 was, in fact, prepared and delivered to Mr. Maloney during discussions that occurred between the parties in the fall of 2007, but argue that such certificate is invalid. Respondents point out that certificate number 5 was signed by Thomas Mattus as president of SSI and not countersigned by the secretary of SSI, respondent Rita Mattus. Although respondents admit delivering the certificate to Mr. Maloney in the fall of 2007 and to back-dating it to June 15, 2004, Mr. Mattus claims he did so to ensure that Mr. Maloney would complete previously scheduled work. According to his testimony, he never intended to confer an equity ownership on Mr. Maloney by tendering the certificate.

As previously noted, the stock certificates themselves create a discrepancy as to the equity ownership of SSI. Accordingly, both parties relied on information regarding the formation of SSI to support their respective ownership claims. The parties agree that the documentation necessary to incorporate SSI was prepared by Mr. Kenneth Farrell, who acted as SSI's sole incorporator. Mr. Farrell is a certified public accountant who had previously done tax work for Mr. Mattus. Mr. Farrell testified at the hearing that he received basic information about the purpose and capital structure of SSI from Mr. Mattus. He also testified that he had one or more telephone calls and/or email exchanges in which both Mr. Mattus and Mr. Maloney

participated at or about the time of the formation of SSI. In addition, Mr. Farrell testified at length regarding the steps he took to incorporate SSI. For example, he stated that he used a specialized company to form SSI. This meant that he faxed an authorization form to a company known as Blackstone, which filed the necessary paperwork with the Secretary of State and listed one of its employees as the sole incorporator. It also meant that a number of documents necessary to complete the incorporation of SSI bore such employee's signature and that such signature should have appeared on the original documents returned by Blackstone with SSI's corporate kit. Upon receipt of the documentation evidencing SSI's incorporation, Mr. Farrell forwarded same to Mr. Mattus, who retained the corporate book at his home. Mr. Farrell did not recall if he received any specific information regarding the equity ownership at that time, but he acknowledged that such information was needed to complete the process of incorporation. Mr. Farrell also testified that he did not complete any of the stock certificates. In fact, Mr. Farrell asserted that, when he was performing tax work for SSI, he was never told that shares of stock in SSI were to be given to Mrs. Rita Mattus or either of the Mattus children. Rather, he assumed that the company was owned by Mr. Mattus and Mr. Maloney. In addition to the basic incorporation documentation, Mr. Farrell prepared additional paperwork related to SSI's incorporation, most notably an election to be treated as an S Corporation (form 2553). Mr. Farrell testified that he prepared this document within a week of June 19, 2004. This document, referred to both Mr. Mattus and Mr. Maloney and stated that each owned 100 shares of stock. Thereafter, Mr. Farrell continued to work with SSI preparing the required income tax filings. Again, Mr. Farrell testified that he was not aware of any claim of ownership by Mrs. Mattus or the Mattus children and that he did not include reference to them in any documents prepared by him in connection with the work he performed for SSI.¹

It is at this point that the parties' claims regarding the equity ownership of SSI diverge. Respondent Tom Mattus asserts that the original owners of SSI were himself and his wife, Rita. He denies that Mr. Maloney had an ownership interest at the formation of SSI in 2004. Rather, he asserts that he and Mrs. Mattus owned 100% of the equity until sometime in 2005 when they decided to transfer shares to their adult children, Christina and Andrew. In fact, Mr. Mattus testified that he asked his wife to complete stock certificates designating 25 shares apiece for each of his children in June of 2005. Accordingly, Mr. Mattus asserts that, in June 2005, the equity owners of SSI were Tom Mattus (100 shares), Rita Mattus (50 shares), Christina Mattus (25 shares), and Andrew Mattus (25 shares). He admits, however, that shares were not issued at or about the time of incorporation and that, when stock certificates were completed, their dates did not reflect the date on which the shares were actually issued.

As to Mr. Maloney, Mr. Mattus claims that at no time did Mr. Maloney acquire an

¹ Mr. Farrell did testify on cross-examination that, in preparing tax returns for SSI in the years 2005 through 2007, he listed Tom Mattus as the 100% shareholder. While he had no specific recollection, he believed that he had been directed by Mr. Mattus to change the ownership from Mr. Mattus and Mr. Maloney to only Mr. Mattus.

equity ownership in SSI. Mr. Mattus acknowledges that he had many conversations with Mr. Maloney in which Mr. Maloney claimed he was entitled to equity. Mr. Mattus also acknowledges that he often introduced Mr. Maloney to third parties as his partner in SSI and referred to him in that capacity when engaging in business activities. Mr. Mattus further acknowledges the existence of certain documents given to and relied upon by third parties that list Mr. Maloney as an owner of shares of SSI, such as credit applications and bank account information. Mr. Mattus acknowledges that tax returns prepared after 2005 do not list his wife and children as equity owners. Finally, Mr. Mattus acknowledges drafting a document in the fall of 2007 entitled "reconciliation agreement" and delivering stock certificate number 5 to Mr. Maloney. As previously mentioned, such certificate (#5) reflects that Mr. Maloney is the owner of 99 shares of stock of SSI or 49% of the issued and outstanding stock of such company. Mr. Mattus concedes that he delivered the stock certificate to Mr. Maloney in the fall of 2007 at Mr. Maloney's home. When asked why such certificate bore the date June 15, 2004, the same date as the prior share certificates, Mr. Mattus replied that Mr. Maloney wanted to have his shares retroactive to the beginning of the company. Mr. Mattus also acknowledges that at the time Mr. Maloney believed he was a "half owner of the Company." However, Mr. Mattus argues that certificate number 5 does not represent such ownership because "the other shares were already given out." Mr. Mattus said it was not his intent to transfer such shares at the time of delivery and that he discussed this fact with Mr. Maloney or in his presence by saying that he would need to get board approval before such certificate became effective.

Mr. Maloney's version of events is decidedly different. Mr. Maloney has consistently argued that he was a co-founder of SSI. Mr. Maloney describes a series of discussions in late 2003 and early 2004 regarding forming a company together with Mr. Mattus while each were working for other entities in the same field. Mr. Maloney described a 50-50 partnership/ownership structure in which he would be primarily responsible for preparing, conducting, and delivering training and development projects and Mr. Mattus would be responsible for sales and administration. Mr. Maloney asserted that his contribution to SSI was to design and develop project management courses. In support of these contentions, he testified that he participated with Mr. Mattus and Mr. Farrell in certain discussions leading up to the formation of SSI, executed necessary documentation as an owner to perform basic corporate functions, and reviewed paperwork reflecting his ownership interests. Mr. Maloney testified that his contribution to SSI's capital was made by preparing the material and programs used by SSI in its business. Mr. Maloney also testified that Mr. Mattus referred to him throughout the time of SSI's operation as a partner or his partner. In fact, Mr. Maloney offered the testimony of Ms. Pamela Peacock, a former employee of SSI, who testified at length with regard to a conversation that she had with Mr. Mattus wherein Mr. Mattus confirmed such fact. Ms. Peacock's testimony provided significant details as to where and when the conversation took place and the statements made by Mr. Mattus. In particular, Ms. Peacock described an exchange with Mr. Mattus in which he responded to her questions regarding a mechanism for resolving a dispute by confirming that the ownership of SSI was divided to give Mr. Mattus 50%, Mr. Maloney 49%, and Mrs. Mattus 1%. Mr. Maloney also relied on the same documentation on which Mr. Mattus

relied, such as loan applications with J.P. Morgan Chase and Mercedes Benz listing him as an owner of SSI. Finally, Mr. Maloney relied on share certificate number 5, which he argued conclusively establishes his ownership interest in SSI.

As previously stated, the issue before the court is the question of ownership of SSI and, by extension, the respondent's motion to dismiss based on petitioner's purported lack of an ownership interest in SSI. This case raises a unique set of facts that bear on the issue of ownership. Unlike the cases cited by the parties in which the corporation failed to issue stock or a party claiming ownership failed to complete a purchase or the steps for the transfer of stock, this case presents a situation in which shares clearly in excess of the authorized capital were prepared and delivered. While respondents ask the court to focus solely on certificate number 5 and to declare that certificate invalid, the issuance of the other shares also contain many unexplained inconsistencies and potential improprieties. For example, SSI was incorporated in 2004, but stock certificates number 1-4 were not issued until much later. Although share certificates were eventually prepared, the record lacks credible evidence to support the conclusion that share certificates 1-4 were properly authorized and issued. Furthermore, there are patent inconsistencies in many of the documents that purport to be part of the corporate kit and some of these documents look to be visibly altered. In particular, the record includes multiple versions of some documents that contain the signature of the sole incorporator, most notably the minutes of the organizational meeting. The typed portions of each of these documents should be identical, but a careful review shows that such documents contain differences in capitalization, spacing, and punctuation. These differences suggest that certain versions that support respondents' claims may have been retyped and possibly altered. Finally, the record contains no credible explanation as to why Mr. Maloney was listed as a 50% owner of SSI on certain documents which were given to and relied upon by third parties, why Mr. Mattus referred regularly to Mr. Maloney as his partner, or why Mr. Mattus behaved in a manner that convinced others that Mr. Maloney was an owner of SSI if, in fact, Mr. Maloney was merely an employee. Moreover, the record does not support the claimed percentage equity ownership of Mrs. Mattus and the Mattus children. There is no credible explanation in the record as to why tax returns and related filings do not reflect the equity ownership claimed by Mrs. Mattus and the Mattus children or why documents given to and relied upon by the third parties do not refer to the Mattus children as equity owners. In fact, the only documents that support their purported ownership interest are those documents that were completed by and controlled by the respondents and about which the court has expressed concern.

The court finds that the facts of this case closely approximate the facts in **Matter of Capizola v Vantage Inte.** (2 AD3d 843). In that case, the Second Department noted that plaintiff's proof was sufficient to establish his ownership interest. In particular, plaintiff supplied consideration for his equity ownership; a stock certificate was delivered to him reflecting such interest, and a K-1 and tax returns listed plaintiff as an owner. The Second Department also noted certain gaps and lapses of credibility in defendant's position. Many of the same facts exist in the current record. First and foremost, the respondents admit that they prepared and delivered

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a stock certificate to Mr. Maloney. The court finds that this fact together with the description of petitioner's contributions regarding his ownership position, the description of the formation of the company, and the behavior of the parties following such formation of SSI provide appropriate evidence to support Mr. Maloney's claim of ownership. When the record is viewed in its entirety, the more credible version of events is that Mr. Mattus and Mr. Maloney were the equity owners of SSI. None of the supporting documents such as tax filings, banking documents, and loan applications refer to the Mattus children as owners of SSI, and only a few refer to Mrs. Mattus as an owner. Moreover, the court cannot ignore the existence of certificate #5, which respondents acknowledge they delivered to Mr. Maloney in an attempt to keep him working on SSI activities. The court finds that all of these inconsistencies and unanswered questions combine to defeat respondents' motion to dismiss.

Accordingly the parties are directed to appear at a conference to be held on March 17, 2010 at 11:00 a.m., Supreme Court, Courtroom 7, Arthur M. Cromarty Criminal Court Building, 210 Center Drive, Riverhead, New York 11901, so that a schedule for the matter may be set

Dated: February 5, 2010

HON. ELIZABETH HAZLITT EMERSON

J.S.C.